# THE INTERNATIONAL LAW OF TREATIES AND UNITED STATES LEGALIZATION OF MARIJUANA

## *Introduction*

Few topics of current interest are as controversial as that of marijuana, and few subjects evoke as much vehemence and emotion when they are discussed — or, as is more often the case, argued. As the debate on marijuana rages, the prospect must inevitably be considered that at some time the United States may legalize the drug.[1] This Comment is not intended to be a discussion of the merits of marijuana legalization or an examination of the medical aspects of the drug;[2] it

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1. The current state of the law on marijuana in the United States is that the primary responsibility for enforcement of penal sanctions for possession and use of the drug is in the hands of each of the fifty states. *See* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1181-1200 (Appendix A) (1970) for tables comparing the various state statutory approaches to marijuana. The primary Federal statute regarding marijuana is the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 (Oct. 27, 1970), 84 Stat. 1236, which replaced or amended all prior Federal statutes dealing with marijuana. For discussion of the state of both state and Federal (before the 1970 Act) marijuana laws, see the Notes in the Arkansas and Vanderbilt Law Reviews cited in note 2 *infra*.

In the event that Congress decided to legalize marijuana, it could probably overturn state laws to the contrary through the Commerce Clause or through the Due Process Clause of the Fourteenth Amendment (on such grounds as that the basis for those laws — *i.e.*, that marijuana is an addictive, harmful drug — has been proven to be false, and that therefore continued criminal sanctions are arbitrary and unreasonable, and consequently are a violation of due process). *See, e.g.*, the discussion in Bonnie & Whitebread, *supra*, at 1125-55, which considers the weaknesses of this approach under present law as well as its merits, and suggests other constitutional arguments.

2. Two excellent general articles discussing the history and current status of Federal and state marijuana laws in the United States, recent research studies on the medical effects of marijuana, the use of the drug in the United States, and evaluating the existing Federal and state legislation, are Note, *Marijuana Laws: A Need For Reform*, 22 ARK. L. REV. 359 (1968), and Note, *The Legalization of Marijuana: A Realistic Approach, Part I*, 21 VAND. L. REV. 517 (1968). The former also discusses how existing laws might be reformed; the latter also recommends changes in the law and considers specific proposals for legalization, along with the reasons for them. An extremely important work is J. KAPLAN, MARIJUANA — THE NEW PROHIBITION (1970). An exhaustive work is Bonnie & Whitebread, *supra* note 1. *See also* L. GRINSPOON, MARIHUANA RECONSIDERED (1971), a valuable medical-psychological study by a psychiatrist at Harvard Medical School.

For reports on the medical effects of marijuana, *see* Weil, Zinberg and Nelsen, *Clinical and Psychological effects of Marijuana on Human Beings*, 162 SCIENCE 1234 (1968); Zinberg & Weil, *The Effects of Marijuana On Human Beings*, N. Y. Times, May 11, 1969, §6 (Magazine), at 28; Hollister, *New Trends in Drug Research: Marihuana—A Case in Point*, 24 SW. L.J. 463 (1970); A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967), esp. at 213-25 [hereinafter cited as PRESIDENT'S REPORT]; Snyder, *What We Have Forgotten About Pot — A Pharmacologist's History*, N.Y. Times, Dec. 13, 1970, §6 (Magazine), at 26; S. SNYDER, USES OF MARIJUANA (1971); Blum, *Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs* in TASK FORCE

takes as its foundation the assumption that at some time in the future, for whatever reasons, the United States will choose to remove the stigma of a criminal activity from marijuana trade and use. Since the flow, use, and abuse of drugs has been — and is — a subject of international concern, it becomes necessary, given this hypothetical future situation, to examine international law and the international obligations of the United States to see if there are any impediments to such domestic action, and if there are, to consider how they might be dealt with by the United States so as to permit the accomplishment of its domestic desires without violating international law.

There are no traditional or customary norms in international law regarding drugs. The international legal norms that do exist are embodied in international agreements and treaties.[3] The first step, therefore, is to examine what international agreements involving drugs the United States is a party to, and to determine how the U.S. is bound by them in relation to marijuana. Beginning in 1927, and concentrated in the period 1927 to 1931, the United States entered into a series of bilateral agreements with a number of foreign states through the exchange of notes providing for mutual cooperation in the field of drug control. These agreements, however, were only for the

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REPORT: *Narcotics* AND DRUG ABUSE (1967); Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature,* 15 U.N. BULL. ON NARCOTICS 15 (1963); REPORT OF THE INDIAN HEMP DRUG COMMISSION (1894). *See also* the excellent bibliography of medical journal articles on marijuana in Bonnie & Whitebread, *supra* note 1, at 1201 (Appendix B).

For discussion of the recent medical evidence on marijuana and proposals for reviewing the law in its light, *see* THE MARIJUANA PAPERS (D. Solomon ed. 1966); Cohrssen & Lieberman, *Cannabis: A Forensic-Medical Review,* 24 Sw. L.J. 446 (1970); Fort, *A Case for Legalizing Marijuana,* CURRENT, Dec. 1969, at 4; Fort, *Marijuana: The Real Problems and the Responsibilities of the Professions in Solving Them,* 5 PSYCHIATRIC OPINION 9 (1968); Robertson, *Limited Legalization For Marijuana,* TRIAL, Aug.-Sept. 1970, at 38.

*Contra,* Tauro, *Marijuana and Relevant Problems* — 1969, 7 AM. CRIM. L. Q. 174 (1969); Munch, *Marihuana and Crime,* 18 U. N. BULL. ON NARCOTICS, No. 2, at 15 (1966); H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS (1953); Anslinger, *Marijuana: Assassin of Youth,* AMERICAN MAGAZINE, July 1937, at 18; ROWELL & ROWELL, ON THE TRAIL OF MARIJUANA, THE WEED OF MADNESS (1939); *Hearing on H.R.* 6385 [The Marijuana Tax Act] *Before the House Comm. on Ways and Means,* 75th Cong., 1st Sess. (1937); *Hearings on H.R.* 3470 *before the Subcomm. on Narcotics of the House Comm. on Ways and Means,* 82d Cong., 1st Sess. (1951).

3. For discussions of the general history of international drug control agreements, *see* Waddell, *International Narcotics Control,* 64 AM. J. INT'L L. 310 (1970); Bevans, *International Conventions in the Field of Narcotic Drugs,* 37 TEMP. L. Q. 41 (1963); Ansley, *International Efforts to Control Narcotics,* 50 J. CRIM. L. C. & P. S. 105 (1959); Gregg, *The Single Convention for Narcotic Drugs,* 16 FOOD DRUG COSM. L. J. 187 (1961).

purpose of exchanging *information* concerning the flow of narcotic drugs and persons engaged in such traffic, and did not involve any actual controls.[4]

Even ealier, with the International Opium Convention of 1912,[5] the United States began to participate in a series of multilateral treaties in the area of international drug control.[6] Since none of these treaties mentioned marijuana (or cannabis, as it is usually called in international agreements), they imposed no obligations on the U.S. concerning that drug. There was a multilateral treaty adopted in 1925 which established controls on cannabis, but the United States was not a party to it.[7] Although the United States signed a United Nations treaty in 1946 which specifically mentioned the 1925 treaty,[8] it was procedural only — shifting the control agencies from the League of Nations to the United Nations — and imposed no new obligations on any party.[9]

Since none of the above agreements or treaties imposes any international legal constraints upon the United States with respect to cannabis, the sole obstacle to U.S. legalization of marijuana is left to be considered. This is the 1961 Single Convention on Narcotic Drugs,[10]

4. *See, e.g.*, Agreement with Austria, exchange of notes at Vienna, April 10 and July 24, 1931 (effective July 24, 1931), 5 Bevans 373 (1970); Agreement with Belgium, exchange of notes at Brussels, February 6 and June 13, 1928 (effective June 13, 1928), 5 Bevans 545 (1970).

5. Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, January 3, 1912, 38 Stat. 1912, T. S. No. 612, 1 Bevans 855, 8 L.N.T.S. 187.

6. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Stat. 1543, T. S. No. 863, 3 Bevans 1, 139 L.N.T.S. 301; Protocol Bringing Additional Drugs Outside the Scope of the 1931 Convention Under International Control, Dec. 11, 1946, 2 U.S.T. 1629, T.I.A.S. No. 2308, 44 U.N.T.S. 277; Protocol for Limiting and Regulating Cultivation of the Poppy Plant and the Trade and Use of Opium, June 23, 1953, 14 U.S.T. 10, T.I.A.S. No. 5273, 456 U.N.T.S. 3.

7. International Convention Adopted by the Second Opium Conference (League of Nations), and Protocol Relating Thereto, February 19, 1925, 81 L.N. T.S. 317.

8. Protocol Amending Earlier Agreements on Narcotic Drugs, Dec. 11, 1946, 61 Stat. 2231, 62 Stat. 1796, T.I.A.S. Nos. 1671 & 1859, 4 Bevans 267, 12 U.N.T.S. 179.

9. *Id.* Art. I: The States Parties to the present Protocol undertake that as between themselves they will, *each in respect of the instruments to which it is a party*, ... attribute full legal force and effect to, and duly apply the amendments to those instruments which are set forth in the Annex to the present Protocol. (Emphasis added)

10. Single Convention on Narcotic Drugs, *done* March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (effective for the United States June 24, 1967) [hereinafter cited as Single Convention]. For the view of the State Department's Legal Advisor on the obligations concerning marijuana imposed by the Single Convention on the United States, *see* 64 AM. J. INT'L L. 633 (1970).

A new United Nations treaty has been proposed which would add to the international prohibition of marijuana. This is the Convention on Psychotropic

a multilateral treaty under the sponsorship of the United Nations. As will be seen, this Convention imposes rather strict obligations on the parties in reference to cannabis and presents a clear barrier to domestic legalization of the drug. As a party to this treaty, the United States is bound by its provisions under international law. In terms of purely domestic American law, it would, of course, be a relatively simple matter for the United States to relieve itself of an unwanted treaty obligation by the simple enactment of legislation by Congress abrogating the treaty provision. Under the Constitution, treaties and Congressional legislation stand on an equal footing, and should there be a conflict between them, the more recent in point of time supersedes the other.[11]

However, under international law, the domestic legality of an action does not excuse the violation of a treaty obligation, and the action thus remains illegal under international law.[12] Therefore, if the stated American belief in and adherence to international law is to have any validity or credence, the United States must accomplish its domestic goals in a manner that does not violate international law. This Comment will examine the 1961 Single Convention and general principles of the international law of treaties to see how this might be done. It should be noted that the actions which will be discussed would have to be implemented *before* domestic marijuana legalization in order to avoid violating the Single Convention and, through it, international law.

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Substances, *done* Feb. 19, 1971, U.N. Doc. E/CONF. 58/6. Cannabis is included in this Convention through the listing of its psychoactive agent, tetrahydrocannabinol (THC), and all its isomers. Were this Convention to be ratified, the same procedures for relieving a party from the cannabis provisions under the terms of the Convention itself would apply as those under the terms of the Single Convention, discussed in the text *infra*, as the procedural articles of both treaties are nearly identical. The discussion of methods of relief outside the terms of the new Convention would involve an examination which is beyond the scope of this Comment, since the new treaty has not been ratified, and such an analysis would therefore be merely academic at present.

11. U. S. CONST. art. VI, §2; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1965) [hereinafter cited as RESTATEMENT]; Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888); Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889); Reid v. Covert, 354 U.S. 1, 18 (1957).

12. RESTATEMENT, §140; International Law Commission, Draft Articles on the Law of Treaties, Art. 23 and Comment (4) (implicit), 21 U.N. GAOR Supp. 9, at 10 *et seq.* (articles only) and 20 *et seq.* (articles and commentary), U.N. Doc. A/6309/Rev. 1, part II (1966), [1966] 2 Y. B. INT'L L. COMM'N 177, 61 AM. J. INT'L L. 263 *et seq.* (articles only) and 285 *et seq.* (articles and commentary) (1967) [hereinafter cited as I.L.C.]; United Nations Convention on the Law of Treaties, *opened for signature at Vienna* May 23, 1969, Art. 27, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969), 8 INT'L LEGAL MAT. 679 (1969) [hereinafter cited as Vienna Convention].

*The 1961 Single Convention on Narcotic Drugs*

The Single Convention on Narcotic Drugs was intended to embody in one treaty and under one central administration the vast array of international agreements regarding narcotic drugs; Article 44 of the Convention specifies that as between the parties, the Convention specifies that as between the parties, the Convention supersedes all pre-existing drug treaties.[13] The preamble to the treaty states that its purpose is to prevent "*addiction* to *narcotic* drugs" (emphasis added). This intent can be seen running throughout the official records of the conference which drew up the Convention, as epitomized by the opening statement of the Acting President of the Conference, who said that the aim of the Convention was "the control of *narcotic* drugs" (emphasis added).[14] The general introductory statements of the national representatives to the Conference also show that their concern was with *narcotics*, and especially with their *addictive* factor.[15] The words "narcotic" and "addictive" have been put into italics in this paragraph to put into perspective what the conference delegates believed they were doing when they included cannabis in the most stringent schedules of drug substances in the Convention. It was generally assumed by the delegates that cannabis was a narcotic substance which was at least habit-forming, if not as addicting as morphine and heroin, and that it was a "stepping stone" to those other drugs. Throughout the Conference one finds references to cannabis as a narcotic substance with "addiction-producing resin" giving rise to "canabis addicts," as an "unmitigated evil," and as a "grave social danger."[16] The leaves of the hemp plant were excluded from the definition of cannabis for purposes of the Convention and included in the less rigorous provisions of Article 28,[17] only because the leaves were considered to contain less of the "narcotic" substance than the flowers and resin of the plant.[18] In short, cannabis was included in the treaty because it was thought to be a narcotic drug, the addiction to which the treaty was designed to

13. For the background and special distinctions of the Single Convention, *see.* the Waddell, Bevans and Gregg articles, *supra,* note 3. The Waddell article, in addition, discusses the work of the international drug control agencies under the Convention and under the United Nations.

14. Official Records of the Conference for the Single Convention, U.N. Doc. E/CONF. 34/24, at 1 (1961) (Official Summary).

15. *Id.* at 4-16.

16. *Id.* at 1, 58f, and 153f. Also Part II of the Official Conference Records, U.N. Doc. E/CONF. 34/24/add. 1, at 174f (1961).

17. See text following note 19 for the provisions of Article 28.

18. Official Records, Part II, U.N. Doc. E/CONF. 34/24/add. 1, at 174f (1961).

prevent. There is no definition of "narcotic" in the treaty; drugs were assigned to one or more of four schedules, each with a different degree of control, depending upon how harmful each substance was considered to be.

The pertinent procedural aspects of the Single Convention will be considered as they arise in the discussion below. It will be useful first to survey the constraints the Convention imposes on the parties to it in reference to cannabis. Except for Article 28(3), in which the parties agree generally to prevent the misuse of the leaves, cannabis leaves are not subject to any of the controls of the Convention. Article 1 (Definitions) reads in pertinent part as follows:

> (1) (b) "Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.
> (1) (c) "Cannabis plant" means any plant of the genus cannabis.
> (1) (d) "Cannabis resin" means the separated resin, whether crude or purified, obtained from the cannabis plant.

The fact that the leaves are not included in the Convention except in Article 28(3), below, which is broad enough to be very loosely interpreted, is not an answer to the question of how the United States could legalize marijuana without violating the treaty despite the fact that there would be little difficulty in legalizing the leaves. If the aim is to eliminate the prohibition of cannabis in the United States, that purpose will not be served by legalizing only one part of the marijuana plant and maintaining the prohibition against other forms of the drug. It must therefore be considered how to deal with all aspects of the international marijuana prohibition.

Article 4 of the Convention provides that the parties must take the legislative and administrative action necessary to carry out the provisions of the treaty. Section (c) of this Article is perhaps the most important clause in the treaty. It specifies that the parties may not permit the production, export, import, distribution, or possession of the listed drugs, including cannabis, except for medical purposes. "Use" is also included in the prohibitions of this section, but only to the extent that a particular drug is subject to the terms of other clauses in the Convention concerning use. It is also relevant that cannabis is included in Schedule IV, the most serious class, because under Article 2(5) a party may then take the action of prohibiting its use. But as

this is a matter of discretion for each party, and is not required by the Convention, the inclusion of "use" in Article 4(c) is not very important for the purposes of this inquiry. The significance of Article 4(c) is the comprehensiveness of its non-discretionary prohibitions. Under Article 36, each party is required to establish penal provisions for all activities dealing with cannabis, ranging down to mere possession. Article 28 deals exclusively with the cultivation of cannabis[19] and reads as follows:

> Art. 28: CONTROL OF CANNABIS
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> (1) If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in Article 23 respecting the control of the opium poppy.
>
> [Article 23 provides that cultivation can be done only under the control of a governmental agency, which strictly supervises and takes the crop of private growers. The agency has the exclusive rights of importing, exporting, wholesale trading, and maintaining stocks of the drug.]
>
> (2) This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.
>
> (3) The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.

Discussions at the Conference show that cultivation of cannabis and its importation and exportation, all under strict governmental control as provided in Article 28(1), was permitted for the purpose of making possible scientific research in and medical uses of cannabis substances if any were discovered.[20] Although states may permit cultivation of the plant, the other provisions of the Convention, as has been seen, prohibit the parties from legalizing the use of the flowers (or tops) and resin of the plant for other than medical purposes.

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19. Article 28 is the only one that deals exclusively with cannabis; in the other Articles discussed, cannabis is just one of the several drugs covered.

20. Note 16 *supra*. It is interesting to compare the final version of Article 28 with the original version, which was much stricter. Even the title of the Article changed from "Prohibition of Cannabis" to "Contol of Cannabis." *See* note 18 *supra*, at 14 ("Article 39 — Prohibition of Cannabis"). The debates at note 16 *supra* indicate that the Conference retreated from an absolute prohibition for fear that it would stifle medical research; further softening occurred when it was decided that including the leaves would create hardships for some countries and would serve no useful purpose.

Section (3) of the Article is less clear. Despite the fact that the Conference debates clearly show that the delegates intended that there be some control over cannabis leaves, although not nearly as strict as that over the resin and tops,[21] Section (3) as drafted is so loosely worded and so easily interpreted almost to the point of irrelevance, that it is difficult to know exactly what its effect is, other than giving each party total discretion over what to do domestically with the leaves. The imprecision of this section seems to make domestic legalization of cannabis leaves a simple matter.

Having examined the international constraints to which the United States is subject in regard to marijuana, ways will now be explored by which the United States may legally be relieved of them should the occasion arise in the future.

## *Possible Means of Relief from the Cannabis Provisions of the Single Convention*

### A. *Under the Convention Itself*

Certain provisions within the Single Convention itself provide for its modification. Under Article 3, a party or the World Health Organization may propose a change in any of the Schedules, which if accepted by the Economic and Social Council Commission on Narcotic Drugs can go into effect upon the recommendation of W.H.O. This includes the deletion of a drug from a schedule. The Economic and Social Council will review the action of the Commission within ninety days if any party requests that it do so, and the Council has the final word on what changes, if any, go through.[22] Following this procedure, the United States could propose that cannabis be deleted from the Schedules of the Convention on the grounds that research shows that it is not an addictive drug and therefore does not belong under the coverage of a treaty intended to prevent drug addiction.[23]

Alternatively, the United States could move for an amendment to the treaty under Article 47, which states:

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21. Note 18 *supra*.

22. Single Convention, Article 3(8) (c): "The Council may confirm, alter or reverse the decision of the Commission, and the decision of the Council shall be final."

23. One may rationally make a further assumption in the hypothetical situation. Although medical evidence at present, as indicated in the scientific reports and the discussions cited in note 2 *supra*, already indicates that marijuana is definitely not addictive, and may even be harmless, it is unlikely that the United States would legalize it without even more evidence of this type becoming available. It would certainly bolster the United States' case for an Article 3 change or an Article 47 amendment to present such further evidence to the Economic and Social Council and the World Health Organization.

Art. 47: AMENDMENTS

(1) Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated to the Secretary-General who shall communicate them to the Parties and to the [Economic and Social] Council. The Council may decide either:

(a) that a conference shall be called in accordance with Article 62, paragraph 4, of the Charter of the United Nations to consider the proposed amendment; or

(b) that the Parties shall be asked whether they accept the proposed amendment and also asked to submit to the Council any comments on the proposal.

(2) If a proposed amendment circulated under paragraph 1(b) of this article has not been rejected by any Party within eighteen months after it has been circulated, it shall thereupon enter into force. If however a proposed amendment is rejected by any Party, the Council may decide, in the light of comments received from Parties, whether a conference shall be called to consider such amendment.

There are many types of amendments that could be offered, but three come readily to mind.[24] The first would be simply to eliminate cannabis entirely from the coverage of the Convention, based on its non-addictiveness. The second would be to provide states with the freedom to choose whether to permit or prohibit the domestic use of the types of cannabis that are currently prohibited. Since the cultivation of cannabis is already permitted under Article 28, it would not be a drastic extension to allow each party to decide if it wishes to allow the domestic use of the flowers and resin as well as the leaves. Such an amendment could go a step further and permit cannabis exportation by states which grow it to states which permit its domestic use, and to provide for its importation by such states.[25] The third possible

24. As a practical matter, it would be wise for the United States to consult with the other major parties to the Convention before proposing an amendment in order to best expedite the amendment once it is offered, to avoid finding itself in a bitter controversy, and to ascertain what form of amendment has the best chance of being accepted.

25. Under Article 31 of the Convention, a party cannot allow the exportation of a drug to a state which prohibits it; the logical corollary of this is that a party can allow the exportation of a drug to a state which permits it. Under Article 23, which is incorporated into Article 28, the fact that a party's governmental agency has exclusive exportation and importation rights indicates that it can utilize them. Although Article 4(c) limits both of these to exportation and importation for medical purposes only, an Article 47 amendment could eliminate this requirement as it applies to cannabis. The second part of the amendment discussed in the text accompanying this note would therefore not be a drastic one.

amendment would be the inclusion in the Convention of a strict definition of the term "narcotic" as a chemical substance which is physically addicting. This would be in accordance with the statement of the treaty's purpose in its preamble — the prevention of drug addiction. This in itself would eliminate cannabis from the coverage of the treaty, since whatever cannabis is, it is known even now that it is not a narcotic.[26]

The Convention also provides more drastic ways by which a party might divest itself of its obligations. Article 46 is a straightforward Denunciation Clause,[27] and the United States could simply denounce the treaty in its entirety. This, however, is probably the least desirable action the United States could take.

Although it would be free to legalize marijuana, international control of truly dangerous drugs would be greatly weakened. Such

26. See the medical information cited in note 2 *supra* and note 47 *infra*. The terms "narcotic" and "addiction" are often used rather loosely. Indeed, the delegates to the Single Convention Conference used them without first agreeing on their meanings. A narcotic is a drug substance with certain properties, chiefly stupefication, while addiction is the habituation to or dependence on the intake of a substance. All narcotics are addictive, but not all substances which are addictive are narcotics (*e.g.*, tobacco). Medical dictionaries written especially for lawyers are unreliable because, particularly in the field of narcotics, a substance may be given a label by the law which it is not given by medical authorities. STEDMAN'S MEDICAL DICTIONARY 1056 (21st rev. ed. 1966) defines "narcotic" as "a drug which, used in moderate doses, produces stupor, insensibility, or sound sleep," and "of or inducing narcosis or lethargy." "Narcosis" (p. 1056) is "stupor or general anesthesia." "Lethargy" (p. 885) is "a state of deep and prolonged unconsciousness resembling profound sumber." W. LEVITT, SHORT ENCYCLOPEDIA OF MEDICINE FOR LAWYERS 279 (1966) defines "narcotic" as "a drug which in sufficient dosage can produce profound unconsciousness, *e.g.*, opium and its derivatives. In lesser dosages drowsiness and sleep resembling natural sleep are produced .... All narcotic drugs tend to develop habit formation, particularly among neurotic individuals." LEVITT defines drug addiction (p. 9) as "addiction (*i.e.*, devotion to a habit) to a drug to such a degree as to become psychologically or physically dependent upon it. Physical dependence is a later and more severe form of dependence .... STEDMAN'S defines drug addiction (p. 26) as "habituation to the use of a drug, the deprivation of which gives rise to symptoms of distress, abstinence or withdrawal symptoms, and an irresistible impulsion to take the drug again." In this Comment these terms are used with the above meanings, maintaining the distinction that although one of the properties of narcotics is addiction, addiction in itself is a separate concept.

27. Article 46: DENUNCIATION
(1) After the expiry of two years from the date of the coming into force of this Convention (Article 41, paragraph 1) [December 13, 1964] any party may, on its own behalf or on behalf of a territory for which it has international responsibility, and which has withdrawn its consent given in accordance with Article 42, denounce this Convention by an instrument in writing deposited with the Secretary-General.
(2) The denunciation, if received by the Secretary-General on or before the first day of July in any year, shall take effect on the first day of January in the succeeding year, and, if received after the first day of July, shall take effect as if it had been received on or before the first day of July in the succeeding year.

action would not be good policy as the United States has an interest in preserving strong multilateral obligations regarding truly addictive drugs. There is, though, in admittedly Machiavellian terms, a certain advantage to be obtained by denouncing the treaty — or threatening to do so. The United States commands a great deal of political pressure from its position as a major supporter (or perhaps prop) of the Single Convention. The threat of United States denunciation of the Convention could be a powerful inducement for the other parties to agree to amend the cannabis provisions, or in an extreme case, to create a special exemption for the United States. Such a threat could not be taken by the other parties as a mere bluff, since the United States has denounced a treaty "for cause" before —*e.g.*, the Warsaw Convention on International Air Transportation[28] — and then withdrawn its denunciation when the treaty was modified so as to be more acceptable.[29]

There is, however, another way to employ the Denunciation Clause that is less cynical than the above, and less likely to evoke bad feelings among the other parties. Article 50 of the Convention permits a state to accept the treaty with reservation, but limits strictly the scope of those reservations:

> Article 50: (1) No reservations other than those made in accordance with article 49 [providing for *transitional* reservations for countries permitting the use of certain drugs as of January 1, 1961] or with the following paragraphs shall be permitted.
> (2) . . . . [Other articles to which reservations may be made: 12-14 (concerning administrative matters), 31(1) (b) (concerning territorial aspects of international trade), and 48 (concerning the handling of disputes).]
> (3) A state which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of the twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before

28. *done* Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876, 2 Bevans 983, 137 L.N.T.S. 11 (effective for U.S. Oct. 29, 1934).

29. Denunciation: 53 DEP'T STATE BULL. 923 (1965); Withdrawal of denunciation: 54 DEP'T STATE BULL. 956 (1966).

> the end of that period, it shall be deemed to be permitted, it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation.

It is seen that there is no specific provision here concerning the treatment a party may afford a particular drug. A reservation of that type would have to come under Section (3) of Article 50. The United States could denounce the treaty under Article 46 and as soon as the denunciation takes effect, re-accept it with an Article 50(3) reservation concerning cannabis with the purpose of making possible its legalization in the United States. This may be an unusual procedure, but this author is aware of no principle of law that would prohibit it.[30]

B. *Methods Outside the Terms of the Single Convention (General International Law of Treaties)*

Whether the United States is able to achieve its goal under the terms of the Single Convention itself or by resort to the general international law of treaties makes little difference in terms of legal effect; both methods are equally valid. However, in the interest of avoiding the establishment of yet another precedent for undermining the integrity of international agreements, it would, as a matter of general principle, be advisable to attempt as much as possible and within reason to employ the above methods before going outside the treaty. But if those methods prove impossible or unreasonably difficult, the United States should then rely on general doctrines of the international law of treaties.

The problem that arises in looking to general treaty law is the same as that faced in nearly every other branch of international law: the lack of a final, binding authority as to what the rules actually are. In the absence of such an authority, a consensus of respected opinion must serve as a substitute. In 1955, in respect to the law of treaties, Professor Lauterpacht wrote: "Apart from that general and unavoidable acceptance of the basic principle, *Pacta sunt servanda*, there is little agreement and there is much discord at almost every point."[31]

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30. Again, there is the practical consideration of prior consultation with the other major parties to the Convention to ascertain the chances of having this Article 50(3) reservation approved.

31. Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 17 (1955).

Since this was written, attempts to codify the international law of treaties — in the Second Restatement of the Foreign Relations Law of the United States (Restatement),[32] the International Law Commission's Draft Articles on the Law of Treaties (I.L.C.),[33] and the Vienna Convention on the Law of Treaties[34] — have helped to reduce the confusion somewhat. However, as they represent the consolidation of expert opinion rather than "hard" law, there is always the question, as to individual provisions, of how firmly grounded the rule is; The codifications admittedly represent a "progressive development" of the law as well as a "restatement" of it.[35] Yet if any

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32. RESTATEMENT, *supra* note 11.

33. I.L.C., *supra* note 12.

34. Vienna Convention, *supra* note 12.

35. Paragraph 35 of the Official Report of the International Law Commission, presenting the 1966 final Draft Articles on the Law of Treaties (reprinted in 61 AM. J. INT'L L. 262 1967):

> The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 of the Commission's Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of governments.

It was intended that these draft articles would serve as the basis for an international convention on treaty law, and indeed when the Conference that drew up the Vienna Convention was mandated, it was to conclude a Convention based on the I.L.C.'s 1966 draft articles. G.A. Res. 2166, 21 U.N. GAOR Supp. 16, U.N. Doc. A/6516 (1966), *repr. in* 62 AM. J. INT'L L. 656 (1967). The Vienna Convention therefore, like the I.L.C. Draft, is part restatement and part progressive development.

> A question which may be asked is how far the rules set out in the Convention constitute codification of existing international law, and how far they represent progressive development. This is a question which is incapable of a precise answer. It would no doubt be fair to say that most of the articles, at least in Parts I to IV, broadly reflect existing international law and practice, although even here, some qualification may be necessary, for example, with respect to reservations, where the state of the pre-Convention law was doubtful, or, at least, uncertain. Other provisions, however, notably those relating to some of the more controversial grounds of invalidity specified in Part V, undoubtedly represent progressive development in the sense that they do not reflect any consistent or coherent body of State practice or doctrine. Here, I refer in particular to such grounds of invalidity as error (Article 48). . . . [I]t was the recognition by the Conference that at least certain of these articles do represent a measure of progressive development which led to the crucial decision to incorporate in the Convention automatically available procedures for the settlement of disputes relating to the application or interpretation of the articles in Part V.

Sinclair, *Vienna Conference on the Law of Treaties,* 19 INT'L & COMP. L. Q. 47, 49-50 (1970). *See also,* for summary and discussion of the Vienna Convention, Kearney & Dalton, *The Treaty on Treaties,* 64 AM. J. INT'L L. 495 (1970); Comment, *A Background Report on Codification of the Law of Treaties at the Vienna Conference,* 43 TULANE L. REV. 798 (1969).

international law of treaties does exist, these codifications and the works of expert commentators — to the extent that they share a common ground[36] — can be taken to reflect that law, taking into account as they do major policy considerations, learned opinion, and the holdings of international judicial tribunals. The Vienna Convention, of course, is a special case, since it is not yet in force and its non-retroactivity clause[37] would make it inapplicable to the Single Convention. Nonetheless, it is still a valuable source of policy considerations and a reflection of what international law is, and constitutes the opinion of authorities in the field on what it ought to be. Consequently, the legal discussion that follows will be based primarily on these codifications, as well as on the writings of expert commentators, and the policy considerations that they reflect will be given great weight.

To relieve itself of the obligations of the Single Convention regarding marijuana, it is submitted that the United States could selectively denounce the treaty — *i.e.*, denounce only the terms of the Convention relating to cannabis. The Convention contains a Denounciation Clause (Article 46), but that clause does not provide for selective denunciation. To see if this is possible, therefore, the rules of general international treaty law in regard to the separability of treaty clauses must be examined.

The modern trend of opinion regarding separability of treaty clauses with respect to actions taken to alter the treaty in some way, is that separability should be increasingly permitted. The policy behind this position is that the integrity of treaties should be maintained as much as possible. If there is dissatisfaction with certain aspects of a treaty which do not affect other provisions of the treaty, rather than have the entire agreement abrogated the independent clauses which are the cause of the dissatisfaction should be severable from the rest of the treaty so that the other clauses can remain in effect. Accordingly, I.L.C. Article 41 provides, in pertinent part, that:

> (1) A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.
> (2) A ground for invalidating, terminating, withdrawing form or suspending the operation of a treaty recognized in

36. As would be expected, in light of note 35 *supra*, the I.L.C. and the Vienna Convention share a common ground.
37. Vienna Convention, Article 4.

> the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in Article 57 ["Termination or suspension of the operation of a treaty as a consequence of its breach"].
> (3) If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:
> (a) The said clauses are separable from the remainder of the treaty with regard to their application; and
> (b) Acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

Article 44 of the Vienna Convention is essentially identical to this (substituting Article 60 for I.L.C. Article 57), except for the addition of a Clause (c) to paragraph (3):

> [A]nd (c) continued performance of the remainder of the treaty would not be unjust.

The Official Summary Records of the Vienna Conference indicate that the policy underlying this separability clause, as United States Ambassador Kearney put it, was that "it was a means of maintaining treaty relations while at the same time permitting the termination of parts of a treaty which ought not to remain in force."[38] This is in keeping with the policy of the International Law Commission, which examined the question of separability *de novo* and stated in its Comment (2) to Article 41:

> (2) The Commission concluded that, subject to certain exceptions, it was desirable to admit the relevance of the principle of separability in the application of grounds of invalidity, termination, and suspension. In general, it seemed to the Commission inappropriate that treaties between sovereign states should be capable of being invalidated, terminated or suspended in operation in their entirety even in cases where the ground of invalidity, termination or suspension may relate to quite secondary provisions in the treaty. It also

38. United Nations Conference on the Law of Treaties, Official Summary Records, U.N. Doc. A/CONF. 39/11 (First Session, 1968) at 230 [hereinafter cited as Vienna Conference]. *See also* U.N. Doc. A/CONF. 39/11/add. 1 (Second Session, 1969.).

> seemed to the Commission that it would sometimes be possible in such cases to eliminate those provisions without materially upsetting the balance of the interests of the parties under the treaty. On the other hand, the Commission recognized that the consensual character of all treaties, whether contractual or law-making, requires that the principle of separability should not be applied in such a way as materially to alter the basis of obligation upon which the consents to the treaty were given. Accordingly, it sought to find a solution which would respect the original basis of the treaty and which would also prevent the treaty from being brought to nothing on grounds relating to provisions which were not an essential basis of the consent.

There is a presumption that the doctrine of separability as applied to denunciation and termination applies only when the treaty so provides or the parties so agree.[39] But the above policy considerations seem to be better achieved by giving greater weight to the *exceptions* to the presumption, as specified in paragraphs (2) and (3) of I.L.C. Article 41 (or Vienna Convention Article 44). In reference to these exceptions, Comment (5) to I.L.C. Article 41 says:

> (5) *Paragraph* 3 then lays down that, if a ground relates to particular clauses alone which are clearly separable from the remainder of the treaty in regard to their application and the acceptance of which was not an essential basis of the consent of the other party or parties to the treaty as a whole, the ground may only be invoked with respect to those clauses. Thus, if these conditions are satisfied, the paragraph requires the separation of the invalid, terminated, denounced or suspended clauses from the remainder of the treaty and the maintenance of the remainder in force. The question whether the condition in sub-paragraph (*b*) — whether acceptance of the clause was not an essential basis of the consent to the treaty as a whole — was met would necessarily be a matter to be established by reference to the subject-matter of the clauses, their relation to other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty.

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39. I.L.C. Article 41, Comment (3).

Section 158 of the Restatement provides for separability of treaty provisions in regard to violation of the agreement,[40] and Comment (d) to that section indicates the criteria for separability:

> *Termination of part of agreement.* An international agreement may include sets of provisions which are separable from the rest of the agreement because they deal with a particular subject-matter and because, in respect to such subject matter, the obligations undertaken by one party are the direct counterpart of the obligations undertaken by the other parties. In such a case the aggrieved party may terminate all or part of that set of reciprocal obligations of which the provisions violated by the defaulting party was one.[41]

It is seen from the above that by any of the approved tests the cannabis provisions of the Single Convention are separable from the rest of the treaty. Cannabis is just one drug covered by the Convention, and as such is a "particular subject matter" upon which the rest of the treaty does not depend for support. As each drug is a separate entity, the enforcement of the terms of the Convention concerning cannabis is not necessary for the performance of the other provisions of the treaty. Since the purpose of the Convention is the prevention of addiction to narcotic drugs, and cannabis is neither addictive nor a narcotic,[42] the cannabis clauses are not essential to the stated purpose of the treaty. The delegates to the Single Convention Conference included cannabis in the Convention, but there was no statement that the cannabis provisions were "essential" to the consent of the parties to be bound by the treaty as a whole.[43] It is difficult to envision how

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40. RESTATEMENT § 158: "Violation of Agreement"
(1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement
....
(b) terminate as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart ...

41. *See also* A. MCNAIR, THE LAW OF TREATIES 475 (1961), on severance of treaty provisions:
> In our submission ... those whose duty it is to apply or construe treaties, either by way of inter-governmental intercourse or judicially, ought not to find it odd that the articles of a treaty should differ widely in their legal character and ought not to feel themselves inhibited from regarding any portion of a treaty as a unit if in their opinion justice so requires.

42. *See* sources at note 45 *infra.*

43. *See* Records of the Conference, *supra* notes 14-18.

American withdrawal from the cannabis provisions would cause the continued performance of the rest of the Convention to be "unjust." Finally, it is a furtherance of the policy grounds underlying separability to permit severance of the cannabis clauses in order that the rest of the treaty, which deals with drugs completely different than cannabis, may remain in force.

Separability is thus not only possible by these standards, but *required* by I.L.C. Article 41(3) and Comment (5), above, and Vienna Convention Article 44(3). There remains only the final requirement of the rule, which is that there be a *ground* for invoking it. Neither I.L.C. Article 41 nor Vienna Convention Article 44 specify what the grounds for invoking the doctrine are, but they may be inferred from the structure of the codifications. Both the I.L.C. and Vienna rules are placed under Part V: "Invalidity, Termination and Suspension of the Operation of Treaties," and further under "Section 1: General Provisions." Following this section are "Section 2: Invalidity of Treaties," and "Section 3: Termination and Suspension of the Operation of Treaties." It follows that the grounds alluded to under "general provisions" are to be found in the specific provisions of the next two sections of Part V. Examining these two sections, two clauses can be found which are applicable to the present situation: I.L.C. Article 45 (Vienna Article 48) — "Error," and I.L.C. Article 59 (Vienna Convention Article 62) — "Fundamental Change of Circumstances." Each of these will be considered in turn. Further reasons for viewing these two Articles as grounds for invoking separability for purposes of denunciation are, first, that there is no specific prohibition against their use in this way (indeed, as will be seen below, the Restatement specifically provides for separability in the case of change of circumstances); second, the combining of these two Articles with the one on separability seems to be a sensible and logical way of applying the law; and lastly, utilizing the Articles in this way furthers the policy considerations involved, as defects in treaties can be corrected while at the same time maintaining treaty integrity by keeping as much of the treaty in force as possible.

The first ground for selective denunciation to be considered is that of error. As seen above,[44] when the delegates to the Single Convention Conference included cannabis in the Convention, they did so because of the general belief that it was a dangerous addictive narcotic. More recent evidence, however, has proven clearly that cannabis is neither addictive nor a narcotic, nor does it necessarily lead to

44. *See* text at notes 15-18 *supra*.

the use of narcotics.[45] Even the International Narcotics Control Board, while stoutly maintaining that "the view is still solidly held in authoritative medical quarters that [cannabis] is a drug of dependence, that it gives rise to public health problems and that its control must be maintained,"[46] nevertheless admitted in 1968 that "established opinion in regard to cannabis has latterly begun to be questioned in some quarters . . . ."[47] And in its 1969 report to the Economic and Social Council the Board discussed research projects in progress concerning marijuana and suggested that if the investigation so indicated, controls over the drug might be relaxed.[48] It also impliedly suggested that legal penalties for cannabis be made less severe than those for morphine and heroine.[49] These are obviously not ringing endorsements for marijuana, but coming from the International Narcotics Control Board, they must be taken as important evidence of a change in the state of knowledge concerning cannabis since the Single Convention was drafted.

Cannabis thus does not belong — and, objectively, never did belong — in the provisions of a treaty whose stated purpose is to prevent "addiction to narcotic drugs." The inclusion of cannabis in a narcotics treaty was a mistake, based on the erroneous scientific and medical information generally available to the delegates when the treaty was drafted. The international legal effect of such an error is that it may be invoked by a party as a ground for invalidating its consent to be bound by the provisions of the treaty concerned. Although the Restate-

45. 21 VAND. L. REV., *supra* note 2, at 522-5 (marijuana not addicting); D. Solomon, *supra* note 2, *passim* (not addicting); PRESIDENT'S REPORT (1967), *supra* note 2, at 213 (not addicting); Blum, *supra* note 2, at 22 (not a narcotic); PRESIDENT'S REPORT (1967), *supra* note 2, at 224 (not a narcotic); Fort (CURRENT), *supra* note 2, at 12 (not a narcotic); D. Solomon, *supra* note 2, *passim* (not a narcotic); PRESIDENT'S REPORT (1967), *supra* note 2, at 225 (marijuana use does not lead to use of hard narcotics); D. Solomon, *supra* note 2, *passim* (does not lead to use of narcotics); Hollister, *supra* note 2, *passim* (marijuana is mild intoxicant); Weil, Zinberg & Nelsen, *supra* note 2 (mild intoxicant); Murphy, *supra* note 2, at 21 ("Both in the complexity of its effects and in more specific characteristics, cannabis is much closer to alcohol than to the opiates or to cocaine."); Blum, *supra* note 2, at 22 (marijuana "seems more likely to produce intoxicating effects similar to alcohol" than hallucinations). *See also* J. KAPLAN, *supra* note 2, *passim,* and L. GRINSPOON, *supra* note 2, *passim.* In 1963 the World Health Organization stated that although the disadvantages of cannabis outweigh its medical advantages, the drug did have medical value and medicinal properties other than those of intoxication. Murphy, *supra* note 2, at 15. On the medical uses of cannabis, see Snyder, *supra* note 2, *passim.*

46. First Report of the International Narcotics Control Board, U.N. Doc. E/INCB/1 at 14 (1968).

47. *Id.*

48. Report of the International Narcotics Control Board to the Economic and Social Council on the Work of the Board, U. N. Doc. E/INCB/5 at 19 (1969).

49. *Id.*

ment is silent on the subject of error, the International Law Commission's Draft Articles and the Vienna Convention specifically provide for it. In identical terms, I.L.C. Article 45 and Vienna Convention Article 48 read as follows:

> "Error"
>
> (1) A state may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> (2) Paragraph 1 shall not apply if the state in question contributed by its own conduct to the error or if the circumstances were such as to put that state on notice of possible error.
>
> (3) An error relating only to the wording of the text does not affect its validity; Article 74 [Vienna Article 79] then applies.

The boundaries of the types of error that may be invoked under this rule have not been clearly delineated; cases of the World Court have dealt with the kind of errors which will *not* vitiate consent,[50] and the state of information or knowledge of the parties at the time they drew up the treaty is not included in these exceptions. Paragraph (6) of the Official Commentary to I.L.C. Article 45 recognizes that "an error in a treaty may sometimes involve mixed questions of fact and of law . . . ." It is clear from the discussion above that the cannabis provisions of the Single Convention were based on an error of fact, i.e., the medical effects of cannabis on the human body. This is certainly analogous to the example of an error in information which Ambassador Kearney put forth at the Vienna Conference in discussing what was to become Article 48 of the Vienna Convention, when he said that "a treaty for the sharing of hydroelectric power might be based on wrong calculations of the capacity of the turbines used. The capacity would not be stated in the treaty, but all the calculations having been based on it, the error would affect the consent to the treaty."[51] It could be argued that the cannabis clauses of the Single Convention were based on erroneous "calculations" as to the effects of the drug on

50. *See* Official Commentary to I.L.C. Article 45, paragraphs (2), (3), and (4), *supra* note 12, for a discussion of these cases.

51. United Nations Conference on the Law of Treaties, Official Summary

human beings. It therefore appears that the mistake in the state of scientific knowledge regarding maijuana in 1961 is clearly the type of error which may be invoked under I.L.C. Article 45 (Vienna Convention Article 48). It was an error concerning a fact "which was assumed . . . to exist at the time when the treaty was concluded. . . ." The false belief that cannabis is an addictive narcotic obviously "formed an essential basis" of the consent of the parties to be bound by the cannabis provisions of the Single Convention, otherwise they would not have been incorporated into this narcotics treaty. For these reasons, error is a valid basis for American denunciation of the cannabis clauses of the Single Convention.

Alternatively, or in conjunction with the error rule, the United States could invoke as a ground for selectively denouncing the Single Convention the doctrine of changed circumstances, or *rebus sic stantibus* as it is sometimes called (although the Latin phrase is losing favor[52]). The basis for the invocation of this doctrine would be that, as has been seen, the state of scientific and medical knowledge concerning cannabis has changed greatly since 1961, and that this qualifies as a change of circumstances under international treaty law. Since the state of human knowledge has never before been considered a "circumstance" in the law of treaties, it will be necessary to examine the existing law on the doctrine and the policy considerations which underlie it[53] in order to understand why it should be considered as such.

Basically, the doctrine of changed circumstances in the law of treaties says that if the fundamental situation underlying treaty provisions becomes so changed that continued performance of the treaty will not fulfill the objective that was originally intended, the performance of those obligations may be excused. Professor Jessup has written that "the doctrine constitutes an attempt to formulate a legal principle which would justify nonperformance of a treaty obligation if the conditions with relation to which the parties contracted have changed so materially and so unexpectedly as to create a situation in

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Records, U. N. Doc. A./CONF. 39/11, at 249 (1968).

52. *See* paragraph (7) of the Official Commentary to I.L.C. Article 59, *supra* note 12. The Latin term indicates an "implied condition" in a treaty, a doctrine the International Law Commission rejected in favor of an "objective rule of law."

53. *See generally* J. BRIERLY, THE LAW OF NATIONS 331ff (6th ed. H. Waldock 1963); Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895 (1967) (an excellent, far-ranging essay on the subject); Lissitzyn, *The Law of International Agreements in the Restatement*, 41 N. Y. U. L. REV. 96 (1966); A. MCNAIR, THE LAW OF TREATIES 685ff (1961).

which the exaction of performance would be unreasonable."[54] The practical policy considerations behind the doctrine have been examined by Professor Brierly:

> [T]he circumstances in which a treaty was made may change, and its obligations may become so onerous as to thwart the development to which a state feels itself entitled; and when this happens, it is likely, human nature being what it is, that a state which feels itself strong enough will disregard them, whether it has a legal justification for doing so or not . . . . It may be, therefore, that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation.[55]

The International Law Commission, in paragraph (6) of its Commentary on I.L.C. Article 59, takes a similarly realistic view in recognizing the need for such a "safety valve" in the law of treaties.[56] The debates at the Vienna Conference also indicate approval of this means of escape from treaty obligations which have become burdensome through a change of circumstances.[57]

That this principle of international law exists is clear;[58] its precise application is not. Section 153 of the Restatement treats it as a rule of interpretation, and as an implied condition in a treaty:

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54. P. JESSUP, A. MODERN LAW OF NATIONS 150 (1948).

55. J. BRIERLY, *supra* note 53, at 331-2.

56. The Commission concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty may remain in force for a long time and its stipulations come to place a undue burden on one of the parties as a result of a fundamental change of circumstances. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the states concerned; and the dissatisfied state might ultimately be driven to take action outside the law. . . . [D]espite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.

57. See Vienna Conference, *supra* note 38, at discussions of Article 59 (later Article 62).

58. The chief precedent for United States invocation of the doctrine of changed circumstances to suspend or terminate a treaty is President Roosevelt's suspension of the International Load Line Convention of 1930 (47 Stat. 2228 (1931-33), T.S. No. 858 (effective January 1, 1933)) in 1941. President's Proclamation, 6 Fed. Reg. 3999 (1941); *see also* 40 OP. ATT'Y GEN. 119 (1941) for the legal reasoning behind the action.

§ 153. Rule of Rebus Sic Stantibus: Substantial Change of Circumstances.

(1) An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.

(2) A party may rely on an interpretation of the agreement as indicated in Subsection (1) as a basis for suspending or terminating performance of the obligations in question only if it did not cause the change in the state of facts by action inconsistent with the purpose of the agreement and has otherwise acted in good faith.

(3) When the conditions specified in Subsection (1) apply only to a separable portion of the agreement, suspension or termination applies only to that portion.

"The position taken by the Restatement seems to be supported by some practice and by the attitudes of the Permanent Court of International Justice in the *Free Zones* case,[59] as well as by the need to preserve the stability of treaty relations. It is more conservative than that of the International Law Commission . . . ."[60] The I.L.C., and the Vienna Conference which convened later, sought to make the doctrine an objective rule of international law. I.L.C. Article 59 reads:

Fundamental Change of Circumstances

(1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

59. [1932] P.C.I.J., ser. A/B, No. 46, at 155-58.

60. Lissitzyn, 41 N.Y.U.L. REV. 55, *supra* note 53, at 109-10. But in general, there is no norm in international law on how the doctrine is to be applied; there has been much difference of opinion and in state practice, and the International Court of Justice has yet to give a definitive ruling on the issue. *See* 43 TULANE L. REV., *supra* note 35, at 818-9.

> (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) The effect of the change is radically to transform the scope of obligations to be performed under the treaty.
>
> (2) A fundamental change of circumstances may not be invoked:
>
> (a) As a ground for terminating or withdrawing from a treaty establishing a boundary;
>
> (b) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Article 62 of the Vienna Convention, following wording almost identical to I.L.C. Article 59, added a third paragraph:

> (3) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Precisely what constitutes a "circumstance" under these rules is not clear. There is general agreement that the change must be in a particular state of *facts*, "the continuing existence of which can be shown to have been assumed by the parties to be essential to the achievement of the objectives of the agreement . . . ,"[61] and that the circumstance that has changed must be an objective one, not merely a political change or a shift of policy.[62] In the case of the cannabis provisions of the Single Convention, the change is in the state of scientific knowledge, and while knowledge has never been mentioned as a circumstance applicable to this doctrine, neither has it ever been *ruled out* as a valid application. The changes invoked in the past have generally been physical or otherwise tangible: the change in the flow of a river, a boundary change, or a change from a state of peace to one of war. The undermining of the *raison d'etre* of treaty provisions as a ground for their termination "occurs most plainly in the case of a physical change . . . . But the same principle is applied to a change which, though not purely physical, destroys the very object of a treaty

61. RESTATEMENT § 153, Comment (b).
62. I.L.C. Article 59, Comment (10).

stipulation . . . ."[63] Intangible changes can thus upset the original presumptions of a treaty in as real a manner as tangible, physical ones.

Although the point has never been considered before, it is submitted that a change in the state of human knowledge is objectively as valid a changed circumstance as any that has previously been recognized under the rule. In light of the policy foundations of the rule, as seen above, this is a logical and reasonable development in the application of the doctrine, especially at a time when treaties increasingly deal with scientific and technical matters. Further, if a mistake in knowledge or information can qualify under the rule of error, it is but a short step to hold the *discovery* of that error to be a change of circumstance. The state of human knowledge ought to be considered as much of a real "circumstance" as the flow of a river, the boundary of a country, or the presence of war or peace.

The delegates to the Single Convention Conference assumed as true that cannabis is an addictive narcotic which should be included in a treaty whose purpose was the prevention of addiction to narcotics. But the state of medical knowledge has changed since 1961, and it is now known that cannabis is not an addictive narcotic. This is an objective fact which undermines the basis of the consent which the parties gave when they agreed to be bound by the cannabis provisions of the Convention. In short, the objectives intended to be served by those provisions are in fact not served by them. The change in the state of medical knowledge thus meets the "essential basis" and "achievement of the objectives" tests of the above-quoted rules. Further, under I.L.C. Article 59 (1) (b) and Vienna Convention Article 62, (1) (b) "the effect of the change is radically to transform the scope ["extent" in Vienna Convention] of obligations still to be performed under the treaty". The change in medical knowledge is therefore a change of circumstance.

Because the change of medical knowledge since 1961 qualifies as a change of circumstance under I.L.C. Article 59 and Vienna Convention Article 62, it may therefore be invoked as grounds for denouncing the cannabis provisions of the Single Convention in accordance with the Separability Articles. The Restatement is even clearer on this point. As seen above, § 153 (3) specifically provides for separability of treaty clauses in event of a change of circumstances.[64]

63. A. McNair, The Law of Treaties 685 (1961).

64. Comment (d) to Restatement § 153 states: "The separability of a portion of an international agreement for the purposes of the rule in this Section is determined by the same test as that stated in § 158 (1) (b) dealing with termination of an agreement as a result of its violation." *See* text at notes 40-1 for the text of Comment (d) to § 158, giving these criteria. *See also* note 40 *supra*, for the pertinent parts of the text of § 158 itself.

Selective denunciation of the Single Convention is not the only possible way to solve the problem. The United States could take the less drastic action of suspending or limiting its performance of the Convention by adhering to all the clauses except those concerning cannabis. This would be based on a changed circumstances rationale. Professor Lissitzyn has written:

> The instances of state practice . . . and the approach to the problem of the effect of changes of circumstances as one of application of the shared expectations of the parties both lead to the following conclusions: (1) Termination of a treaty obligation is not the only possible and proper effect of invocation of a change of circumstances. Depending on the expectations of the parties and the nature of the change, the proper effect may be suspension or limitation of performance, as the case may be. (2) Strictly speaking, there is no requirement in all cases that non-performance be preceded or accompanied by a formal notice to the other parties, although concern for orderliness, prudence and courtesy make the giving of such notice generally desirable . . . . (3) The exercise of the right to cease or limit performance does not depend on the specific consent of the other party or upon a third-party decision. (4) The presence in a treaty of a clause limiting its duration or providing for denunciation does not exclude the invocation of a change of circumstances as a ground for immediately ceasing or limiting performance. (5) A change of circumstances may be invoked even if it was not "unforeseen" in an absolute sense. The parties may have been aware of the possibility of the change but for various reasons failed to provide for it expressly.[65]

Reflecting the heart of this reasoning, Vienna Convention Article 62 (3), as quoted above, specifically provides for suspension as a proper means of meeting a situation of changed circumstances.

A final possibility is that the United States could negotiate an agreement with as many of the other parties to the Single Convention as possible, modifying the obligations of the treaty in regard to cannabis. Such an agreement would then be valid between the parties to it, under I.L.C. Article 37 and Vienna Convention Article 41, provided that it did not interfere either with the rights of the remaining parties

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65. Lissitzyn, 61 AM. J. INT'L L., *supra* note 53, at 911-12.

to the Convention or with the "object and purpose" of the Convention.

It is a fundamental principle of international law that if there is no real protest to any of the above actions of the United States, the assent of the other parties is assumed—*i.e.,* failure to object is held to be implied consent.[66] Further, any protests would have to be definite and clear to be effective; mere "paper protests" are insufficient as they do not actually assert any rights.[67] However, even if there were protests, none of the above actions is likely to be considered a material breach of the Convention by the United States. There is no definition of a treaty "violation" or "material breach" in the Restatement; § 158 just refers to "violation" generally. However I.L.C. Article 57 (3) and Vienna Convention Article 60 (3) do define the term:

> (3) A material breach of a treaty, for the purposes of the present article, consists in:
>
> (a) A repudiation of the treaty not sanctioned by the present articles [Vienna: "the present Convention"]; or
>
> (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Since the proposed actions are based on what these codifications permit, they may be said to be "sanctioned" by them. Further, cannabis is neither addictive nor a narcotic, so it is not essential to the purpose of the Convention; since the other provisions of the treaty can remain in force with equally strong effect without the inclusion of cannabis, the actions that have been proposed would not involve the United States in a material breach of the Single Convention.

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66. A. McNAIR, THE LAW OF TREATIES 508 (1961); Lissitzyn, 41 N.Y.U.L. REV. *supra* note 53, at 110; RESTATEMENT § 156 and Comment (b); I.L.C. Article 42 (b); Vienna Convention Article 45 (b).

67. The M/S "Ari," Court of Appeal for Schleswig (Germany), 1954, 7 JAHRBUCH FÜR INTERNATIONALES RECHT 405 (1957), quoted in W. FRIEDMANN, O. LISSITZYN & R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 402-3 (1969).

### *Other Possible International Implications: Speculation*

It is interesting to speculate on what some of the other international effects might be were the United States to free itself of the cannabis provisions of the Single Convention and legalize marijuana. The potentially large American market may appear quite tempting to the major cannabis-producing nations such as Mexico and the countries of the Middle and Far East. Although Article 31 of the Single Conven-

tion states that a country cannot allow exportation of a drug to one whose domestic law prohibits it, this implies that a country *can* export drugs to one whose law *permits* it; and although Article 23 (incorporated into Article 28, on cannabis) permits a government which allows cannabis cultivation to have exportation rights, this is all negated by the control of Article 4 (c) which allows production and exportation of the specified drugs for medical purposes only. Consequently, the producing states which are parties to the Convention would have to alter their obligations under the treaty in order to take advantage of the American market. They may therefore choose to follow the lead of the United States, either in joining or agreeing with American proposals and actions under the treaty, or by similarly denouncing or suspending the cannabis provisions of the Convention if the United States should resort to extra-treaty methods. This would leave the treaty intact for the other parties.

Another possibility, in light of the strong influence which the United States has as a major supporter of the Convention, is that with American endorsement of the cannabis clauses, other parties may just "give up the ghost" on the cannabis clauses and stop enforcing them. The cannabis clauses would then become a dead letter even if they remained in the treaty.

Such a result would hardly be a serious one in view of the medical evidence on the effects of cannabis. There is a danger, however, that the parties would begin to treat the *entire* Convention lightly. This must be guarded against because there are drugs which are truly dangerous if abused, and continued international control over them is necessary. Some states, in technical violation of their treaty obligations, make little effort to enforce their drug laws even *now*. It is generally known, for example, that despite the fact that the Netherlands is a signatory to the Single Convention, many types of drugs are openly available in Amsterdam, with little noticeable attempt to enforce the laws that are on the books; and France, another party, at least up to the present has been somewhat less than energetic in closing down the heroin processing plants that operate there, chiefly in Marseilles. International control of drugs must be maintained, and this should not be forgotten if cannabis is leagalized. There is a vast difference to be remembered between marijuana and a narcotic.[68]

68. This is not to say that the solution to the problem of a dangerous drug is to make it illegal. If the illegality of a drug causes its price to go up to the point where users have to commit crimes in order to obtain money to purchase it, serious doubts

*Conclusion*

This Comment has examined means by which the United States could legally free itself of the constraints imposed by the 1961 Single Convention on Narcotic Drugs if at some future time it decided to legalize marijuana. The methods available under the Convention itself are clear enough; resort to the general international law of treaties required closer examination. Of chief importance in this second question is the recent medical evidence proving that marijuana is not an addictive narcotic. The provides the basis for invoking as grounds for selective denunciation of the Convention both the doctrine of error and that of changed circumstances (the latter also being applicable to unilateral suspension of the cannabis provisions). It was emphasized that although the question has not arisen before, in terms of changed circumstances, the state of human knowledge ought to be considered as much a real "circumstance" as any other that has been recognized.

If at some future time the United States decides to eliminate the criminal connotations of what an increasing number of people are coming to view as another example of those "crimes without victims,"[69] it will be able to do so. It has been seen that the legal doctrines exist which will enable this country to be relieved of its current treaty obligations if it wishes to legalize marijuana domestically, and to take that action without violating international law. The doctrines are there; they await invocation.

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may be raised as to whether any benefits to society are really gained by the illegality. If a person is determined to use a drug, it might be better for him to be able to obtain it from a governmental agency at a reasonable price than for him to have to steal to get it. Laws designed to protect a person from himself may well have their philosophy questioned if they result in harm to innocent third parties who are the victims of robberies, muggings, and even murder. This, however, is a matter for each country to decide individually, and it is for this reason that international control of dangerous drugs must be maintained.

69. Phrase borrowed from E. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY (1965).

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